IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 236 of 1988

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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AMRELI JILLA PANCHAYAT & 2 - Appellant(s)
Versus
SHARDAGAURI BHAGWANDAS HATHI- NARAYAM - Defendant(s)

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Appearance :
MR HS MUNSHAW for Appellant(s) : 1 - 3.
MR DM THAKKAR for Defendant(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 03/10/2006

ORAL JUDGMENT

1. Heard Mr.H.S. Munshaw, learned counsel for the appellants and Ms.Vinita Vinayak on behalf of Mr.D.M. Thakkar, learned counsel for the respondent.

2. Short facts leading to the present appeal are that the plaintiff Shardagauri Bhagwandas Hathinarayam was serving as an employee with the present appellant No.1 Amreli Jilla Panchayat. On the allegation that she was absent without any authority of law right from 1/4/1970, she was removed from service on 3/10/1973. The order was challenged by her in Regular Civil Suit No.36 of 1974. In the Suit she did not claim back wages, which could accrue in her favour from the date of her removal to the date of institution of the suit, but simply prayed for her reinstatement. The Suit came to be decreed on 21/7/1979. The present appellants who were defendants in the earlier matter, did not take any exception to the said judgement and decree, w.e.f. 24/10/1979 reinstated her. It appears that after her reinstatement, a dispute arose that whether she would be entitled to her back wages or not. The plaintiff - respondent, thereafter, filed another suit being Regular Civil Suit No.373 of 1981 and claimed her back wages from 3/10/1973 (date of removal) to 24/10/1979 (date of reinstatement). The suit was again contested by the present appellants. They raised the plea of limitation referring to Article 7 of the

Indian Limitation Act that the plaintiff would not be entitled to the salary beyond a period of past three years. They also submitted that in view of the provisions contained in Rule 2 of Order II of the Code of Civil Procedure, the plaintiff would not be entitled to any back wages because she did not claim her back wages in her earlier Regular Civil Suit No.36 of 1974. They also raised certain pleadings submitting inter-alia that the plaintiff was absent from services without any cause or without obtaining leave, therefore, in view of the misconduct committed by her, she would not be entitled to the back wages.

3. The learned trial court, framed various issues, gave opportunity to lead evidence and after hearing them decreed the suit in toto. Being aggrieved by the said judgement and decree passed by the learned trial court, the plaintiff filed regular first appeal. The learned first appellate court, after hearing the parties observed that the question raised in appeal relating to applicability of Rule 2 of Order II, limitation could not be decided in favour of the appellants - defendants. It, however, interfered in the matter of grant of 100% back wages and

slashed the same to 50%. The appellants being aggrieved by the said judgement and decree are before this Court.

4. The appeal has been admitted for hearing on 14/10/1988 on the following substantial questions of law;

(i) Whether in the facts and circumstances of the case, the lower Court was justified in awarding 50 percent of back wages to respondent plaintiff, even after holding that the respondent plaintiff was responsible for remaining absent without leave, and there was nothing on the record to show that the respondent plaintiff present herself to resume the duty and the appellants have restrained her?

(ii) Whether in the facts and circumstances of the case, the lower Court was justified in awarding 50 percent of back wages, when there was no specific pleadings, averments and prayer in the plaint of previous Civil Suit No.36/74 filed by the respondent - plaintiff and there was no

order passed by the learned Trial Judge with regard to back wages in the said suit?

(iii) Whether in the facts and circumstances of the case, the lower Court was justified in exercising the jurisdiction, not vested into it as per Sec.9 of the C.P.Code and Rule 19(1)(a) and Rule 19(3) of Gujarat Panchayat Service (Discipline & Appeal) Rules, 1954?

5. Learned counsel for the appellants submits that Article 7 of the Indian Limitation Act would apply with its full force, as right to recover wages which became due is to be exercised within three years. He also submits that the provisions of Order II Rule 2 of the Code of Civil Procedure would apply with full force, because on the earlier occasion, the plaintiff was entitled to seek back wages from the date of termination till the date of suit and could also request the Court that salary for the interim period be also granted and reinstatement should be allowed with complete back wages. Referring to the merits of the case, he submitted that the present is a case where the plaintiff

remained absent unauthorisedly and under the circumstances she would not be entitled to back wages.

6. Learned counsel for the respondent on the other hand submitted that all these questions have been aptly discussed by the learned first appellate court and in the present case where the plaintiff was entitled to 100% back wages, entitlement has been reduced to 50%.

7. So far as the first question relating to Article 7 of the Indian Limitation Act is concerned, the Supreme Court in its celebrated judgement in the case of Maimoona Khatun and anr. Vs. State of U.P. and anr., reported in A.I.R. 1980 S.C. 1773 has observed that the cause of action for recovery of the back wages ordinarily would be on the date when the wages becomes due but in a case where a person has been removed from services, the cause of action for recovery of the back wages would be the date of order on which the termination or removal is held to be bad. The Supreme Court has also observed that if a matter is pending before the Court for long many years, a handle cannot be given in the hands of an employer who

could see that the employee remain outside the service, even on a wrong or bad cause. In view of authoritative pronouncement of the Supreme Court I must hold that the plaintiff suit is not barred by limitation. So far as the applicability of Order II Rule 2 of the Code of Civil Procedure is concerned, Rule 2 Sub-Rule (1) says rather mandates that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of cause of action, but a plaintiff may relinquish any portion of his/her claim in order to bring the suit within the jurisdiction of any Court. In the present case, according to the appellants, the plaintiff could sue for the back wages and could also claim future wages along with the reinstatement.

8. Mandate of Rule 2 of Order II simply says that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of cause of action. For future salary a cause of action would accrue in favour of the plaintiff as and when the wages or salary becomes due. In the present case, except upto the date of the suit, cause for claiming salary never accrued in favour of the plaintiff. The plaintiff could not say that wages which have yet not

accrued in her favour be granted in her favour. Entitlement of an employee to the wages would be governed by the terms of the agreement. If on expiry of the calender month wages are to be paid then the cause of action would accrue every month, but no cause of action for future salary would accrue in favour of the plaintiff on the date of the suit. The plaintiff certainly could not file the suit for wages which did not accrue in her favour. The argument raised by the appellants deserves to be rejected.

9. So far as the question No.1 is concerned, It must be held that once the Civil Court decided the issue in favour of the plaintiff in its earlier judgement that the termination was illegal and the appellants did not challenge the said findings, then the termination from the date of the issuance of the order would be illegal and in case the Court finds that the termination is illegal then it would have jurisdiction under the given set of the facts to award or not to award back wages. In the case on hand, the trial court came to the conclusion that in view of the findings recorded in Regular Civil Suit No.36 of 1974, plaintiff's dismissal was bad, therefore, the plaintiff would be

entitled to 100% back wages. The appellate court in exercise of its jurisdiction had found some reasons to reduce the back wags. The award or refusal of the back wages in the given set of the facts would always depend upon a fact which is to be found by the court. In the present case, the appellate court when holds that the right to recover the back wages from the date of the termination upto the date of the earlier suit were lost because of the Rule 2 of Order II then there was nothing wrong in it and simultaneously there was nothing wrong in granting 50% of the back wages. This question would also have to be answered against the interest of the appellant. So far as the question No.3 is concerned, Mr.Munshaw, learned counsel for the appellants submit that in a matter like present, Civil Court would have no jurisdiction to inquire into the correctness, validity and propriety of the order removing the plaintiff from service. In the opinion of this Court unless it is argued by the appellants - defendants that the suit is barred by some provisions of law governing the rights of the parties or in view of the constitution of a Tribunal which has exclusive jurisdiction to decide the matter, Civil Court would always have jurisdiction. Even otherwise, Civil Court would

always be jealous of provisions which say that the Civil Court would have no jurisdiction. Unless law says that the civil Court would have no jurisdiction an argument would not denude the Civil Court of its authority to decide a matter. This question is also decided against the interest of the appellant.

10. In view of the discussion aforesaid, the appeal deserves to and is accordingly dismissed. No costs. Let a decree be framed accordingly.

(R.S.GARG,J.)

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